



**CITY OF LODI
COUNCIL COMMUNICATION**

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AGENDA TITLE: Authorize City Attorney to Enter Retainer Agreement with Mark Berry of Mayall, Hurley, Knutsen, Smith & Green in Stockton, California for legal services for individually named officers in *Newhall v. City of Lodi*.

MEETING DATE: April 6, 2011

PREPARED BY: City Attorney's Office

RECOMMENDED ACTION: Authorize City Attorney to enter Retainer Agreement with Mark Berry of Mayall, Hurley, Knutsen, Smith & Green in Stockton, California for legal services for individually named officers in *Newhall v. City of Lodi*.

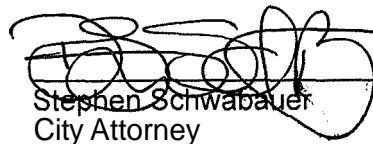
BACKGROUND INFORMATION: The City and several of its officers are being sued in connection with a police response. The City Attorney's office will represent the City but to avoid the potential for a conflict of interest between the

City and its officers, the City Attorney's Office routinely secures separate counsel for the officers. Steve Scott has routinely provided this representation, but Mr. Scott was recently appointed to the San Joaquin County Superior Court as a judge. Staff has also worked with Mark Berry, of Mayall, Hurley, Knutsen, Smith & Green, in Stockton, on a number of cases where the City and San Joaquin County were jointly sued. Staff has been impressed with Mr. Berry's performance and believes he will provide effective and affordable services. In fact, he defended a Sacramento federal trial involving a response to a drug-influenced subject who was behaving erratically in March of this year. His rate is \$185 per hour to the County and he is extending the same rate to us. His fee agreement is attached and will be governed by the City's standard billing guidelines.

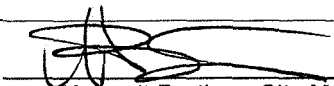
The City is insured through CJPRMA with a \$500,000 Self Insured Retention (SIR). Legal expenses are counted toward the \$500,000 SIR.

FISCAL IMPACT: Not to exceed \$500,000

FUNDING: General Fund Liability Reserve


Stephen Schwabauer
City Attorney

APPROVED:


Konradt Bartlam, City Manager

CITY HALL
221 WEST PINE STREET
P.O. BOX 3006
LODI, CALIFORNIA 95241-1910
(209) 333-6701
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CITY OF LODI
City Attorney's Office



D. Stephen Schwabauer
City Attorney

Janice D. Magdich
Deputy City Attorney

February 23, 2004

To: All Outside Counsel

From: D. Stephen Schwabauer, City Attorney

Subject: City of Lodi Billing/Legal Services Guidelines

I. BILLING GUIDELINES

1. Billing Rates

The City must agree upon all billing rates used by the law firms when they are initially retained and on a going forward basis. Under no circumstances shall billing rates be increased on any litigation in progress without prior approval.

2. Flat Charges; Minimum Charges

Counsel shall not apply flat charges as part of its rate structure unless such flat charges have specifically been agreed to, nor shall counsel apply a minimum charge for any activity.

3. Billing Increments

Attorneys and paralegals shall bill time in no greater than 1/10 hour increments.

4. Frequency of Billing

All cases shall be billed monthly. The invoices should be sent directly to the Lodi City Attorney, electronically and in hard copy.

5. interoffice Conferences

The City will not pay for extensive interoffice conferences. The City will pay for reasonable team meetings to coordinate the handling of the case.

6. Disbursements

All disbursements must be separately identified on the invoice. As to any charge which amounts to more than \$100, the backup or receipt is required to process payment.

7. Travel Expenses

The City will only reimburse counsel for reasonable travel expenses. Only coach class airfare, moderately priced hotel accommodations and moderately priced meals will be reimbursed. The City will not accept any lavish or unnecessary expenses for reimbursement. Travel expenses shall be itemized on counsel's billing, with copies of all receipts attached for expenditures exceeding \$100.

8. Meals and Entertainment

All requests for reimbursement of meals shall be individually itemized, showing persons present, amounts incurred and the business purpose. Under no circumstances will the City reimburse counsel for the entertainment of their attorneys or staff.

9. Bill Format

Counsel shall submit bills in the standard line item format, which separately itemizes the time for each individual activity. The City will not pay for services invoiced in a block billed format.

10. Recovery of Overhead

The following items will not be reimbursed, unless the City specifically agrees to accept the expenses:

- (a) Word Processing, clerical, secretarial charges, or calendaring charges (unless legal research is required) whether expressed as a dollar disbursement or time charge.
- (b) Storage of open or closed files, rent, electricity, local telephones, postage, receipt or transmission of telecopier documents, or any other items traditionally associated with overhead.
- (c) Telephone, postage, express litigation support, Westlaw/Lexis, or other service in excess of the amount actually expended by the firm for such services.
- (d) Photocopy charges in excess of \$.10 (ten cents) per page.
- (e) Auto mileage rates in excess of the rate approved by the Internal Revenue Service for income tax purposes.
- (f) Secretarial overtime. Where case requirements demand overtime, the City will consider reimbursement on a case-by-case basis. The City will not reimburse overtime incurred for the convenience of counsel or by counsel's failure to meet deadlines known in advance.

11. Travel Time

When it is appropriate for counsel to bill for travel time, the time for such travel shall be separately stated and in no event shall exceed 8 hours per trip. Counsel will be expected to perform work during the travel time to the extent feasible. Double billing for travel time and for such work however will not be accepted. Counsel will not bill for travel to or return travel from San Joaquin County.

12. Experts and Consultants

Bills from experts and consultants shall conform to all of the above. A copy of these requirements should be furnished to all experts and consultants.

13. Paralegal Services

There is real value in paralegal services when used appropriately to perform work on a file. However, the City will not pay for either attorney or paralegal services which are clerical in nature, such as for file organization, binder assembly or document retrieval, where there is no significant value added to the case.

II. STATUS REPORTS

The City requires regular status reports from counsel. A status report should be provided every 60 days on cases involving significant litigation or sooner should developments warrant. At minimum a status report should contain the following information.

A. Summary of Facts

The report should include a summary of the salient facts, including but not limited to the allegations/cause of action alleged against the City and the amount of claimed damages. This report should indicate how these facts have been confirmed (that is through depositions, witness statements, etc.).

B. Critical Issues

A statement of critical issues should also be included. This includes:

- (1) Critical Liability Issues;
- (2) Critical Damages Issues; and
- (3) Other Critical Issues (listed in order of priority).

C. Summary of Facts Which Engendered This Claim

Counsel will provide information on the following topics as it becomes available:

(1) Co-Defendants and/or Third Party Defendants

identity of parties.

Respective attorneys' names, business address and telephone number

Factual and legal basis for plaintiffs'/cross-complainants' claim against other parties. Brief summary of probable exposure.

(2) Witnesses

Name, address, age and occupation.

Summary of witnesses' relevant information.

Effectiveness as a witness – rate (from excellent to poor) his/her demeanor, general credibility, memory and particular tendencies as a witness.

(3) Analysis of Claim: Liability and Damages

Plaintiff's theories. The theories asserted on behalf of the City.

Co-defendants' and/or third party defendant theories. Strengths and weaknesses of the parties' positions.

Chance of defense verdict for the City, co-defendant and/or third party defendant (discuss each separately).

Causation issues, i.e., was the negligence a cause in fact of the damages claimed.

Probable damages (compensatory) if case is lost.

Punitive damage exposure? Attorneys' fees recoverable?

Probability of contributory negligence finding (i.e., defense verdict) or probable percentage of comparative negligence (i.e., plaintiff's percentage of fault).

Probable apportionment of fault among defendants (assign percentages).

Net exposure (state a dollar amount) to insured after all apportionment and based on probable damages.

Settlement value and basis for evaluation. Should case be tried? Explain risks.

Brief summary of probable outcome as to both liability and damage issues, indicating whether you consider this a case of liability and why.

(4) Settlement Discussions

What is the demand?

What, if anything, has been offered? (If definite offer has not been made, but an indication or range has been discussed, so state, listing each indication or range figure discussed.)

What do you recommend at this time?

Requests for settlement authority must be made on a timely basis. We will not accept requests for authority on the "eve of trial" or the day before a settlement conference.

Requests for settlement drafts must be in writing. All settlement drafts take some time to process in order to permit the necessary control and security procedures to be applied. In those rare cases where a settlement draft is required on a priority basis, counsel shall immediately advise the City of the precise date when the settlement draft is required.

(5) Future Handling

Is the investigation of this case complete?

If not complete, what further investigation do you suggest and what would it cost?

What further discovery is needed and what would it cost?

Experts – explain need, field, number, probable testimony, cost, and whether plaintiff has one. If so, who and how effective is he/she?

(6) Legal Expenses

What are the total legal expenses to date? What do you expect into the future?

D. Investigation and Discovery

The investigation and/or discovery required to resolve the above critical issues should be outlined.

E. Litigation Budget

The City requires a Litigation Budget detailing all activities you expect to perform in connection with the case. Counsel will be held to that budget unless prior approval is granted by the City Council to exceed the budget.

LEGAL SERVICES AGREEMENT

Identification of Parties. This agreement is made between Mayall, Hurley, Knutsen, Smith & Green, A Professional Corporation, hereinafter referred to as "Attorney", and The City of Lodi, hereinafter referred to as "The City". This agreement is required by California Business and Professions Code Section 6148 and is intended to fulfill the requirements of that section.

Retention of Law Firm Rather Than Particular Attorney. The City is retaining a law firm, not any particular attorney, and the attorney services to be provided to The City will not necessarily be performed by any particular attorney. The attorney primarily responsible for the performance of legal services shall be Mark E. Berry.

Legal Services to Be Provided to The City. The legal services to be provided by Attorney to The City are as follows: Represent The City and or individual defendants in matters relating to the matter entitled Newhall v. City of Lodi.

Responsibilities of Attorney. Attorney will perform the legal services called for under this agreement, keep The City informed of progress and development, and respond to The City's inquiries and communications.

Responsibilities of The City. The City shall: (1) make all payments required by this agreement within the time periods set forth in this agreement; (2) be available to meet with Attorney when requested; (3) timely provide Attorney with all information and documentation requested.

Basis of Compensation - Attorney Fees. The City will pay Attorney for the legal services provided under this agreement at the respective hourly rates of the individuals providing the services. The rates fall within the following ranges: \$185.00 per hour for partners and of-counsel attorneys, \$165.00 for associates, \$110.00 per hour for law clerks and paralegals. Attorney will charge in increments of one tenth of an hour, rounded off for each particular activity to the next highest one tenth of an hour.

The City must agree upon all billing rates used by the law firms when they are initially retained and on a going forward basis. Under no circumstances shall billing rates be increased on any litigation in progress without prior approval.

Counsel shall not apply flat charges as part of its rate structure unless such flat charges have specifically been agreed to, nor shall counsel apply a minimum charge for any activity.

The City will not pay for extensive interoffice conferences. The City will pay for reasonable team meetings to coordinate the handling of the case.

Counsel shall submit bills in the standard line item format, which separately itemizes the time for each individual activity. The City will not pay for services invoiced in a "block billed" format.

Costs. In addition to attorney fees, The City will pay all "costs" in connection with Attorney's representation of The City under this agreement. Costs in excess of \$250.00 may be sent directly to The City for direct payment.

All disbursements must be separately identified on the invoice. As to any charge which amounts to more than \$100, the backup or receipt is required to process payment.

The City will only reimburse counsel for reasonable travel expenses. Only coach class airfare, moderately priced hotel accommodations and moderately priced meals will be reimbursed. The City will not accept any lavish or unnecessary expenses for reimbursement. Travel expenses shall be itemized on counsel's billing, with copies of all receipts attached for expenditures exceeding \$100.

All requests for reimbursement of meals shall be individually itemized, showing persons present, amounts incurred and the business purpose. Under no circumstances will the City reimburse counsel for the entertainment of their attorneys or staff:

Recovery of Overhead.

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The City requires regular status reports from counsel. Unless otherwise directed in writing by the City Attorney, a status report should be provided every 60 days on cases involving significant litigation or sooner should developments warrant. At minimum a status report should contain the following information. Reporting shall be directed to D. Stephen Schwabauer unless otherwise instructed.

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Statements and Payments. Attorney will send The City monthly statements indicating attorney fees and costs incurred and their basis. The invoices should be sent directly to the Lodi City Attorney, electronically and in hard copy,

Entire Agreement. This agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

Severability in Event of Partial Invalidity. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

Modification by Subsequent Agreement. This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out.

Effective Date of Agreement. The effective date of this agreement will be the date when this agreement is signed by all parties.

Signatures and Dates. The foregoing is agreed to by:

DATE

D. STEPHEN SCI-IWABAUER, CITY ATTORNEY
CITY OF LODI 

MAYALL, HURLEY, KNUTSEN, SMITH & GREEN
A PROFESSIONAL CORPORATION

DATE

BY MARK E. BERRY, Shareholder